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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/727, 554 12/04/00 ARAI

M 040679/1173

EXAMINER

WM31/1012

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CORRIGAN, T  
ART UNIT

PAPER NUMBER

3748  
DATE MAILED:*5*

10/12/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/727,554	ARAI ET AL.
	Examiner	Art Unit
	Jaime W Corrigan	3748

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

**A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.**

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on \_\_\_\_.  
 2a) This action is FINAL. 2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 1-8 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) 6 is/are allowed.  
 6) Claim(s) 1,2,4,5,7 and 8 is/are rejected.  
 7) Claim(s) 3 is/are objected to.  
 8) Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 11) The proposed drawing correction filed on \_\_\_\_ is: a) approved b) disapproved by the Examiner.  
 If approved, corrected drawings are required in reply to this Office action.  
 12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
 \* See the attached detailed Office action for a list of the certified copies not received.  
 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
 a) The translation of the foreign language provisional application has been received.  
 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3.  
 4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_.  
 5) Notice of Informal Patent Application (PTO-152)  
 6) Other:

**DETAILED ACTION**

***Double Patenting***

Claims 1, 5 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of copending Application No. 09/727,789. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1, 5 of the application are essentially the same as claim 1 of the reference, however, they are broader in scope.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-2, 5 are rejected under 35 U.S.C. 102(b) as being anticipated by Havstad (PN 5,224,460).

Regarding claims 1, 5 Havstad discloses a method for controlling intake air of an internal combustion engine, the engine having at least one combustion chamber provided with intake means together with an intake manifold provided with a throttle valve (See Figure 1), wherein the opening and closure timings of the intake means are adjustable entirely independently from the crankshaft position to control the amount of intake air supplied to the combustion chamber (See Abstract), the method comprising : a control for a response adjustment to variable valve timing control of the intake means for unthrottled intake air control (See Column 1 Lines 28-30, Column 7 Lines 25-35).

Regarding claim 2 Havstad discloses providing an engine response performance during unthrottled intake air control as much as an engine response performance during throttled intake air control (See Figure 2, Column 5 Lines 5-16, Column 8 Lines 9-20).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4, 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Havstad (PN 5,224,460) in view of Atago (PN 6,286,478).

Havstad discloses the invention as recited in claim 1, above, and further discloses processing a second operation variable to cause said response adjustment (See Column 7 Lines 25-35).

Havstad fails to disclose determining a first operation variable indicative of a target intake air and a target valve timing based on the first operation variable; to close the intake means at a valve closure timing indicated by said processed second operation variable; and additionally fails to disclose a computer readable storage medium.

Atago discloses determining a first operation variable indicative of a target intake air (See Abstract, Column 13 Lines 40-45); determining a second operation variable indicative of a target valve timing based on said first operation variable (See Abstract, Column 13 Lines 40-45); varying the valve closure timing of the intake means to close the intake means at a valve closure timing indicated by said processed second operation variable (See Abstract, Column 13 Lines 40-45); and Atago further discloses

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a computer readable storage medium having stored therein data representing instructions executable by a computer (See Abstract).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have utilized the valve timing and computer storage medium taught by Atago in the Havstad device since it would improve engine response performance.

***Allowable Subject Matter***

Claim 3 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claim 6 is allowed.

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Pischinger (PN4,700,684), Aoyama (PN 4,357,917), Fogelberg (PN 5,140, 953), Richeson (PN 5,284,116), Kawasaki (PN 6,189,512) use similar throttle valve and computer systems.

Any inquiry concerning this communication from the examiner should be directed to Examiner Jaime Corrigan whose telephone number is (703) 308-2639. The examiner can normally be reached on Monday - Friday from 8:30 a.m. – 5:00 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas E. Denion, can be reached on (703) 308-2623. The fax number for this group is (703) 308-7763.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0861.

JC

Jaime Corrigan

*Jaime Corrigan*  
Patent Examiner

October 9, 2001

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*Thos Denion*

THOMAS DENION  
SUPERVISORY PATENT EXAMINER  
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